Supreme Court, U.S.
FILED
051262 JAN 17 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VIC FEDOROV
68 Laurel Road
Princeton, N.J. 08540
(609) 921-6561

Petitioner

v.

MICHAEL BLOOMBERG; THE CITY OF NEW YORK

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Court

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Is the ninth amendment a logical tautology?
2. Can the ninth amendment be read as "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" *in court*, because court is where rights are retained?
3. Is compromise important to retaining rights?
4. Does the ninth compel courts to consider solutions that reconcile rights?
5. Why do we have an unrecognized logical tautology?
6. How is the ninth compared to the right to petition for redress of grievance?
7. Should the ticketing of alcohol stop in return for a reduction of noise?
8. Are compromises like this a form for other rights?
9. Does NYC Administrative Code violate the 10th amendment?
10. Should a judicious use of alcohol be promoted?
11. Does an ordinance disparaging alcohol unduly inhibit Free Assembly?
12. Is the ordinance against alcohol cruel and unusual, the way it is now?

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OPINIONS CITED

Cited is the decision for the second circuit court of appeals to dismiss my case on motions, pursuant to the limited rights of *Pro Se*, as frivolous, filed and entered September 15th, 2005. Also cited is the lower court dismissal of my case *sua spontua* filed October 15th 2004 and entered October 25th 2004 and the docket number and judge only came with the order for dismissal.

The petition for panel rehearing that is denied October 19th. Reference to the case being accepted at the second circuit court of appeals is cited, of January 27th, 2005. And the response to my case arguing that the right to petition the government to redress grievance should extend into a fair timetable for the filing of pleadings, and discovery and motions, by the Chief Judge of the Second Circuit, is cited as dismissing my complaint on August 18th, 2005.

I also cite a letter from the district *pro se* clerk discouraging the filing of papers until a docket number and judge is received alerting me the case is under judicial review.

STATEMENT REGARDING JURISDICTION

This case was dismissed on motions in the second circuit on September 15, 2005. This petition for a panel rehearing was denied on October 19, 2005.

I believe since this process is called a "petition," it is within my first amendment right to petition the government to redress grievance. To be able to exercise this right, according to the Federal Rules of Appellate Procedure rule 41(d)(2) **Staying the mandate pending petition for certiorari,** a motion to stay the mandate must be made within 7 days of an order on a petition for panel rehearing, which I did before the panel rehearing was denied on Oct. 19, 2005.

United States Section Code Title 28 § 1254(1) protects this right.

On January 30th a letter was dated alerting me I had 60 days to correct the mistakes and resubmit my petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS, ORDINANCES

There are four constitutional amendments to which I make reference, two references to Article 3 of the Constitution, and an ordinance from New York City's Administrative Code.

Regarding the Constitutional provisions: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Article III Section 1

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution." Article III Section 2

Regarding the amendments I refer to: "Congress shall make no law .... abridging ... the right of the people peaceably to assemble and to petition the government for a redress of grievances." Amendment I

"Excessive bail shall not be required ... nor cruel and unusual punishments inflicted." Amendment VIII

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amendment IX

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Amendment X

Regarding an ordinance of New York City's Administrative Code: "No person shall drink or consume an alcoholic beverage, or possess, with intent to drink or consume, an open container containing an alcoholic beverage in any public place except at a block party, feast, or similar function for which a permit has been obtained." New York Administrative Code 10-125(b)

A concise statement of the case setting out facts material to the consideration of the questions, and containing the basis for federal jurisdiction in the court of first instance.

In October 2003, I was sitting on a bench on Central Park West near 73rd Street in NYC, quietly drinking a beer, when four police officers came out of an unmarked car and gave me a ticket. I was

running for local office in Princeton, N.J., at the time on a platform that specified the sentiments I see in the tenth amendment of reserving powers for the state or the people, not the local elect, and advocated some form of free assembly as a form of local self-rule.

Naturally I was quite prone, having studied the constitution in this political endeavor, to using the constitution and law to aid the people, and found the ninth amendment to be relevant to this experience.

After asking the magistrate in NYC court, why the ninth amendment does not shield me from such denial and disparagement of right the constitution did not take away and was thus retained, and not getting an answer, I thought it wise to bring up the concern as a federal question.

I always understood the issue involved dealing with the noise revelers made in their display of alcohol use in NYC sometimes up to the early nineties, when Giuliani rescinded such liberty under his "quality of life" campaign. New York City is polite and generally well-behaved enough for me to have never witnessed a ticket for this ordinance,[1] though the number of instances of people using alcohol outside in NYC since the ordinance 10-125 is considerably less that what it was. I will say that even so, a small percentage of people returning from bars late at night are prone to making immature noises.

I brought the question up in Federal District Court because I felt the ninth amendment protected me, by implicitly leading to retaining rights, and enabled me the recourse of federal court. In truth one can't say the ninth amendment is violated, but more, that people can bring up an issue under it, for it is a positive law, not a negative one. It is not violated by the darkness of wrong, but shines light upon the inclinations of good, and thus, that is why I thought the case to be a good "federal question."

Yet incumbent as the ninth amendment, and law, is to how such is used, I was not able to demonstrate precisely that, being dismissed *sua sponte*, meaning upon getting a docket number and judge, which is a requirement for making pleadings and discoveries in the Southern District of New York, my case was dismissed in the same instance, and day. Moreover, Chief Judge Mukasey, who made such decision

[1] Except the day of a Garth Brooks concert in 1995.

(the lower court judge is now Judge Maas), said he would not take any attempt to appeal in good faith.

Upon such climate I complained to the judicial circuit in a forward-looking and corrective way, understanding standing up for your rights wouldn't be called such if you weren't knocked down, and being aware of the problems of power all around, in conformity to media's rendition of the world, being too alone, and an ignorance of the Kingdom of God, a term and testimony I value (Judicial Complaint Docket No. 05-8502). This also raised the question of whether the extent of the right to petition the government to redress grievance extends into the right to make pleadings where the case contends.

In what I call the Machiavellian give and take of the system, to make things a little bit better in a hard system, my case was granted an appeal, but it is difficult to make a case in motions, and in the time for a petition for rehearing.

But my case is about a probationary period, for which the reasons for the restriction upon alcohol are promoted as immaturity and noise, which then would be a duration upon which the people may be tested as to their relation to appropriate behavior, and there able to have been instilled a wise spirit about alcohol.[2] Not only are restrictions that don't serve the purpose of improving necessary behavior unusual: the notion of society being punished or restricted aggregately for the misdeeds of a few, seems a principle that can work itself out to positive end.

CONTENTIONS

> ***"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."***

Denial and disparagement of a right measures how retained a right is. If a right is retained, it is not denied or disparaged. If a right is denied or disparaged, it has not been effectively retained. The recognition of a logical tautology is the capstone to this case.[3]

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[2] Sparta (and other city-states) made laws designed to improve the public.
[3] Statement that is true no matter what (*American Heritage Dictionary*).

From here we try to retain the right (such process can exist without the ninth amendment). In the courts, the opportunity is provided to examine solutions and proposals that balance the reasons for restrictions with the ability to practice liberty.

The capstone supports an even simpler and clearer, active, sense of the positive element of the ninth amendment, which I enunciate this way: "The rights enumerated in the Constitution shall not be construed to deny or disparage others retained by the people *(in court)*," *through salubrious measure*. Courts are where rights are retained. The italicized words are not necessary to signify, but indicate, the sense of the ninth amendment I am trying to share. The word "shall" changes to "can't" through this process. Denial and disparagement isn't the issue. Solutions that retain rights are. This affirms that if the right is retained through the solution, the right will be less denied or disparaged. I maintain this analysis is historical enough to compel the scrutiny of the courts, because it could pave the way for a great deal of creative remedies to current denials and is the effective and intended use of the ninth amendment.

This compromise is usually contingent on improving the behavior of the people. Knowing that the drinking age may go down if the underaged reduce the number of drunk driving incidents may motivate the underaged to more maturity.[4] Knowing maintaining the allowance of alcohol outside in a city is contingent upon peace and quiet, may make the people more mature about alcohol.[5,6] Knowing that police cameras and curfews in parks and crime-prone places may be taken away if the community spirit can reduce crime, and may increase rapport and behavior. Liberty is not a right, but the chance to compromise should be pronounced.

Liberty is based upon maturity. Individuals and societies have levels of maturity. Maturity can reduce restriction by an awareness of the greater right the restriction has in sight (safety, quiet). This understanding teaches retaining rights, broadens rapport between

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[4] Movement to lower the drinking age in Vermont.

[5] Ordinance ticketing outdoor alcohol under "noise-complaint" category of NYC Administrative Code.

[6] Savannah seemed to combine politeness with alcohol outside. Brussels overly encourages alcohol outside.

government and the people, and treats people as the political entity they traditionally are, by encouraging their own destiny.

To repeat: the logical tautology contains two options. (A retained right will not be denied, or the failure to retain a right will result in future denial). It is only through the courts we can see which path will be traveled: depending on the goodness of proposed solution. So we seek resolve regarding the ninth amendment and particular solution.

Forgetting, the reasons, why there are restrictions, upon society, might be cruel and unusual, punishment. Though restrictions merely deny or disparage, and for good cause, restriction's point is to emend behavior and mandate or motivate improvement. Even education can be seen to exist because the people don't seek to educate themselves enough (*Petrey v. Flaugher* D.C. Ky 1981, 505 F.Supp 1087). Why alcohol is now allowed outside in NYC is lost. The whole sense of what understanding of alcohol is required for it to be allowed outside is forgotten. That's cruel because the reason for punishment or restriction or denial or disparagement, should always be known; and unusual, because punishment/restriction usually does not go on forever or capriciously.[7]

Four ways happen, in cases when the ninth amendment is invoked. One is the ninth amendment is called not a source of rights (*Minority Police Officers Assn of South Bend v. City of South Bend, Ind.*, D.C. Ind 1983 555 F. Supp 921) (though disparaged rights imply retained rights): the denial of a right is not a constitutional violation, but real politic; and the first amendment allows the court to examine grievance and consider the issues involved on their own. In these cases, the plaintiff rarely has proposed a solution to the situation. The army private that wants long hair didn't try to convince the army of the merits of a long-haired brigade (*Anderson v. Laird*, CA III 1971 437 F.2d 912). Too often no attempt is made to meet the criteria the restriction envisions. The debate between universities and the army seeps aside the issues of "homosexuality." The cause of making crack-cocaine laws more proportionate didn't argue that the high from crack-cocaine is contingent upon the fear of draconian punishment, or that the great pressure of long jail

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[7] Our penal system has set sentences, parole opportunities and inculcates reasons for punishment.

sentences causes so much pressure as to disrupt behavior and actually have the effect of reverse psychology (*USA v. Marvin Spencer* C.A. 7th 1998). The movement to lower the drinking age in Vermont must provide the motivation to naturally assert itself, as a movement, to reduce the drunk driving of that age-group.

The second is that the constitution and laws are looked at to see if a right is retained. The second amendment is debated as to allowing individuals, not militias, guns (*San Diego County Gun Rights v. Reno* 98 F.3d 1121). The disproportion regarding federal laws involving crack-cocaine are weighed against state constitutions insuring proportionate punishment (*USA v. Marvin Spencer* C.A. 7th 1998). The right of married couples to contraceptives is seen as within the penumbra of the Bill of Rights (*Griswold v. Connecticut Supreme Court*, 1965). Thus this invocation of the ninth hinges on the court's determination of whether a right is already retained. But, this makes the ninth amendment redundant because the issue is in the body of law that already exists. The right to choose to not reproduce is greater than the right to privacy. The Hatch Act should examine the benign quality to political activity, and address complaints of political bias; rather than restrict.

Then there is the kind of case where the rights aimed for by the restriction are balanced by the rights aimed for by the liberty sought. Thus, if a curfew is shown to not be necessary, it must be removed (*City of Wadsworth v. Owens Ohio Mun.* 1987, 536N, F.2d 674 Ohio Misc. 2d1). If smoking violates employee health the criterion is achieved that makes that right greater than the right to smoke in a bar. Homosexuality in the navy is not a right (*Dronenburg v. Zech* 1984 741 F.2d, 1388 239 U.S. App. D.C. 229); long hair, in general, is (*Stradley v. Anderson* D.C. Neb 1972 349 F.Supp 1120).

Courts should care about truth, not law. Truth is the parent of law.

Then there is the kind of case I believe was intended, whereby a compromise such as alcohol outside, is allowed, if the people can demonstrate the incentive behind the deal (lowering the drinking age in return for first demonstrating accident reduction), allowing alcohol outside if such liberty and respect can decrease noise. Treating people like adults this way, may reduce noise across the board and teach that liberty is contingent upon behavior. This is my

constructive application of the ninth amendment. Even if the people are shown to be incapable of such initially, it is folly for a city to just accept and punish that dysfunctional behavior without probationary periods that test the ability of the people. And should the people abuse the right, the right should be taken away swiftly.

This is the use of the ninth amendment I think our founders intended: Whereby the courts provide an opportunity to analyze a solution that reduces the denial and disparagement of a right. This retains rights, involves compromise, and criteria, views the people as all on the same ship and is part to the merit and benefit of the effort to retain rights, our founders knew.

I did not have the chance to develop this in pleadings in the lower court, being dismissed *sua sponte* the day I received a docket number and judge after waiting nine months, nor at the circuit level in a brief being dismissed on motions. The ninth amendment particularly requires pleadings in the lower court to see how the ninth amendment is used. The supervisory role of the Supreme Court is needed, because I have been trying to say something important efficiently without securing the compunction and schedule of the courts.

I do not believe the ninth amendment is settled law. The logical tautology, its promotion of rights, the active sense of not denying rights retained by the people in the court through salubrious cases, as not seen and precedential, shows me a need to notify lawyers, people and courts of the ninth amendment to litigate effectively and improve society that a form exists to suggest ideas that reduce restrictions (U.S.C. 28 (1) (23)).

This understanding is consistent with the ninth amendment not guaranteeing any rights, except the right of compromise, which is constructive because compromise can lead to rights. This shows the ninth to be constructive and interpretive, something that does not do nothing, as no words in the constitution are meant to have no effect (*Myers v. U.S.* 272-U.S. 52 151 ["real effort should be given to all the words it (the Constitution) uses"]), and a constitutional savings clause that saves rights not mentioned from the degradation that can come with the difficult politics that govern the people (*Charles v. Brown* D.C. Alabama 1980 495 F.Supp 862) (*Richmond Newspapers v. Virginia* 448 U.S. 555, 579-8&n.10 (1986) (Chief Justice Burger).

This invests in the people a forward-looking and corrective, prosecuting perspective.

Is the purpose of the ninth amendment expressed in clearest and easiest language and why wasn't this form seen before? Did we need these principles of compromise more firmly etched? The founders left work for us, a boost for the future. The greater metaphysic that rendered the Kingdom of God,[8] renders scholars a function of metaphysic as well. To an enlightened mind, it shouldn't be astounding that the active sense (the rights enumerated in the constitution shall not be construed to deny or disparage others retained by the people *(in court)*) has not registered because an enlightened mind has recognized the absence of the world.

It is also vain to assume good and good government, especially locally, can be everywhere. There is an autonomy to reason, and our culture that must stand up itself.[9] Compromise rules politics, and metaphysics can rule interpretation that does not seek metaphysical power.

So the central, republican locus, to our social contract,[10] bound to be imperfect but containing mechanisms to self-perfection, in its first analysis of these mechanisms will tend to defend the status quo and not advocate change.

I'm reminded of Machiavelli's anecdotes regarding how the people, disappointed with the counselor's office, achieved the compromise of being allowed four tribunes for the first time[11]. Yet the people they elected to the position were nobles. It was a compromise, whereby in return for the chance to have such a consulate, they agreed to elect nobles to represent them. Machiavelli ascribes such to the people's inability to agree on their individuals, but I feel a deal when I feel one. That is the way good is won: by offering a little, your offer is accepted. Likewise his nearby anecdote of a man in whose negotiation between the people and the senators, the people, with the chance to replace Senators with their own

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[8] Machiavelli BII chap 11, "Nor ... was there eve a legislator who, in introducing extraordinary laws to the people, did not have recourse to God ..."

[9] Cassisser, Earnst, The Myth of the State, "The Social Contract" "Autarky."

[10] Citizen rights protected by Republic uniting diverse regions.

[11] Machiavelli, *The Discourses*, Bk 1 chap 47.

preferred to keep the nobles already elected, in return for being able to act as a political entity outside the palace the negotiator had holed up the senators. Politics is based on compromise. Unify the people; don't change the people in power. Get the ninth amendment, but not its easy understanding.

Could the Constitution and America have ensured Free Assembly as a mode of self-rule by the people that got along with the federal government? The Constitutional Democratic Republic of Rome did such and gave us the phrase "Free Assembly." The tenth amendment is violated by the local elect and appointed who exercise powers reserved for the state or the people yet are neither. If ordinances were determined in Free Assembly or town meetings (with voice votes and consensus), the balancing between quiet and maturity, restriction and liberty, would have been worked out long ago (Fedorov v. Princeton et al. 04-3583 C.A.3, 04-366 N.J.). Good must be secured, is not automatically granted, so wisdom is practical.

The debate over society three centuries ago, was taking place in countries of kings. Royal courts held back legal ones while the substantive logics of natural rights justified polity. The Constitutionally Democratic Republic of Rome rejected kings, and developed institutions and practices of law that encouraged many judges, prosecuting policy, and representing the interests of the people (Machiavelli, *The Discourses*). Our more perfect union is to evolve to the meter of improvement and suggested, in the bond of continuing the constitution, by the right given to congress to establish inferior courts of short duration.

Our founders knew the effort to retain rights, and which can be derived from the ninth amendment, is healthy and good, having done such at a national level of our republic. They knew rights come from within. That is why we, the west, have Christianity: To forgive the beginning to begin the next level: To understand the expedient level of the creation of polity.

The ninth is meant ideally at a local level. A republic primarily unites different areas in a national polity. There is no desire to intrude upon the local level, beyond its seven powers, or substantially create or mandate a way of life over the wishes of its people. That common sense is reserved for the people and state.

The means to compromise can evolve to bodies of many local citizens looking over disputes of rights. The problem of eminent domain, if the people rules themselves in free assembly locally consensusing formally on matters such as the economy and population and school, would dissipate. This is within the traditions of the American conscience. The compromise of the national elect and appointed of our Republic might work and play into the social contract that originates our polity and generates our rights: For those reasons, the elect at a local level can mitigate.

Thus we start to see, how the ninth, evolving out of the eighth, in citing restrictions where people have forgotten what emendation of behavior the restriction passed sentence on, points to the tenth, as where the harmony of local self-rule by the people is protected, which in turn wouldn't deny and disparage rights so. Yet identifying the cause of denial and disparagement, identifying rights, thinking compromisingly, and believing in ability, are critical skills for the people and lawyers to learn. It can lead to the assertions for the opportunity for communal meals; the necessity for semi-formal opportunities to meet neighbors; formal town meetings where the economy and population can be discussed; the right to have people to play team sports. This idea can manifest community concerns and proactive people.[12]

The ninth is overarching federal law that seeks win-win solutions regarding "others" (other rights). The integral of the ninth amendment may be balancing rights through solutions that utilize the people to achieve criteria; the derivative of the ninth amendment is the compulsion to see if proposed solutions can work, the same way criminal cases seek guilt.

We start to see the concerns of the first amendment right to petition the government to redress grievance and the ninth amendment's concern with other rights overlap and are separate.

The first amendment is for and allows one person to bring up a grievance that may affect only him. The ninth amendment is for the resolution of ordinances and policy that affect many.

The first amendment has a sense of grievance which seeks damages. The ninth amendment refers to only a denial or

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[12] Reserving power for the people leaves Free Assembly as the way to practice it.

disparagement of a liberty for which a solution is sought that balances rights with human dignity.

The right to petition the government to redress grievance suggests wrongs and violations of law or understanding whose wrong or error isn't what is in question. The ninth amendment wants changes in law or policy, that already provide stability, through equitable solution.

The first understands some things are undeniably grievous. The ninth understands society is imperfect. One stands up against wrong, the other stands up to the status quo.

The ninth defers to the first as grounding the source of right and liberty in solutions within cases that could have been brought up anyway as a grievance seeking court order. The ninth is a track that streamlines a form for certain kinds of cases seeking liberty.

The ninth looks at redress. The first looks at grievance.

If the curfew in Central Park, NYC, were lifted one hour for every month crime was significantly reduced, would the respect of the people in this concept lead to a desired reduction in crime? These are broad and traditional understandings of the people within our conscience that lead to basic concerns of the people.

We further contend the conveyance of alcohol as used to relieve stress in a hard world, may create more relaxed people. Freud said society is so hard the people need opiates.

Further, people seek good conversation and bonds, not alcohol. Restrictions upon alcohol forget that. Too often alcohol is seen in a "partying" way, and I don't believe that is its intent. Alcohol is used because the Kingdom of God is not always easy to take and requires a certain opiation. It is wise for a city to promote a functionalizing use of alcohol, even as simply a means of quenching thirst, not a social catalyst.

I was walking by Washington Square Park in NYC the other day, and two people were having an anti-war protest on a cold evening signified by a banner of a bed sheet. Relating to the difficulties of shepherding or galvanizing the people to some critical mass, good spirit, and empowering experience, I sympathized and joined with them. And I told them I always had more success drawing a caring crowd if the people were a little drunk. Alcohol seemed to put the heart of the people in a more demanding place and dissolve the

inhibitions the sober get in the face of activism. I must admit, if they had just a little alcohol for people, they might attract a more energetic and capable people. Thus I must conclude that while alcohol outdoors is fairly only disparaged in NYC, such disparagement does inhibit Free Assembly, and it is safe to say our founders did not intend for Free Assembly to indicate a strictly sober affair.[13]

If the ninth amendment specifically reinforces the ideal of compromise to a procedural degree that cases that propose compromises that can lead to the reduction of restriction are encouraged, then the genesis to retain rights by the people is coming out of the ninth amendment and may be independent and essential enough to be substantive.

Justice Goldberg in Griswold understands the ninth amendment "as a function of the courts to interpose a veto with regard to legislative and executive efforts to abridge other fundamental rights." I would hope this understanding would extend to the analysis of local rights, and wouldn't use the word "veto" as much as "solve." Nor do I think this is limited to fundamental rights. The impetuses to such movement and decision must come from the people, as ultimately they are responsible, and trusted to care-take liberty: "all political power is inherent in the people" (N.J. State Constitution, 2A).

There are two historical movements in this case that compel scrutiny. The first is using courts to change policy, that trusts those who argue for the people, and is in the tradition of Brown vs. Board of Ed and Griswold. Those two cases found a solace in the interpretation of laws existing. This case seeks to be heard on the logic of the ninth amendment. This movement is consistent with the movement in Ancient Rome, to tribunes, who trustily argued on behalf of the people and explains how issues may be argued in court. And as the complement of the people and people in power, became diluted, so there was recognition of Locke's time, that there could be fine laws to aid the people that have not been distinguished so yet. Both concepts are at the heart of better government.

"Substantive due process or right protected by this amendment must be one that is fundamental, able to be recognized as such by

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[13] Look at the piazzas of Rome, which were built for the people and Free Assembly; imagine someone trying to peaceably assemble some resolve of the people without the use of alcohol.

references to teachings of history and basic values that underlie our society and such historical reference is necessary because of the need for objective standard (*Petrey v. Flaugher* D.C. Ky 1981, 505 F.Supp 1087."

Respectfully submitted.

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APPENDIX A

S.D.N.Y.
04-cv-8125
Mukasey,
C.J.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

[Filed September 15, 2005]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 15th day of September two thousand and five,

Present:

Hon. Thomas J. Meskill,
Hon. José Cabranes,
Circuit Judges,
Hon. Alaan H. Nevas,
*District Judge.**

Vic Fedorov,

Plaintiff-Appellant,

v. No. 05-0298-cv

Michael Bloomberg, *et al.*

Defendant-Appellee

Appellant, *pro se*, moves this Court for a preliminary hearing, "an aspect of this case to be filed pursuant to sec code 1983," a "meeting with the NYPD," and "analysis upon 10th Amendment for this case" and a petition for a writ of mandamus to prohibit the City of New York from issuing "drinking tickets." Upon due consideration, it is hereby ORDERED that the motions and

mandamus petition are denied and the appeal DISMISSED. See Pillay v. Immigration and Naturalization Service, 45 F.3d 14, 17 (2d Cir. 1995) (this Court has "inherent authority, wholly aside from any statutory warrant, to dismiss an appeal or petition for review as frivolous when the appeal or petition presents no arguably meritorious issue" for consideration); Neitzke v. Williams, 490 U.S. 319, 325 (1989) (an appeal is frivolous if the appeal "lacks an arguable basis either in law or in fact").

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: s/Lucille Carr

*The Honorable Alan H. Nevas, Senior Judge of the United States District Court of the District of Connecticut, sitting by designation.

APPENDIX B

Judge Mukasey
04 CV 8125

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed October 15, 2004]

VIC FEDOROV,

CIVIL

Plaintiff,

JUDGMENT

-against-

THE HONORABLE MAYOR BLOOMBERG,
THE CITY OF NEW YORK,

Defendants

Pursuant to the order issued October 15, 2004 by the Honorable Michael B. Mukasey, Chief Judge, dismissing the complaint under 42 U.S.C. § 1983, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed. I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from the Court's order would not be taken in good faith.

s/Michael B. Mukasey
MICHAEL B. MUKASEY
Chief Judge

Dated: October 15, 2004
New York, New York

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON OCTOBER 25th, 2004

APPENDIX C

Judge Mukasey
04 CV 8125

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed October 15, 2004]

---------- X

VIC FEDOROV,

Plaintiff,

ORDER OF DISMISSAL

-against-

THE HONORABLE MAYOR BLOOMBERG, THE CITY OF NEW YORK,

Defendants

---------- X

Plaintiff, appearing *pro se*, brings this action alleging that New York City's prohibition against public consumption of alcohol violates his federal constitutional rights under the Ninth Amendment. As plaintiff alleges that various government officials violated his federal constitutional rights, I liberally construe the instant complaint as having been brought under 42 U.S.C. § 1093/ See Haines v. Kerner, 404 U.S. 519, 520 (1972) per curiam); McEachin v. McGuinnis, 357 F.3d 197, 200 (2d Cir. 2004) ("when the plaintiff proceeds pro se, as in this case, a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations."); Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) (*pro se* must be reviewed "to raise that strongest arguments they suggest") (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). Plaintiff seeks judgment declaring the law unconstitutional, as well as $11,500.00 to compensate him for the duress associated with the prosecution of this claim. As plaintiff has paid the requisite filing fee, I direct the Clerk of Court to assign a docket number to this action. For the following reasons, however, I dismiss the complaint.

As an initial matter, plaintiff's allegations against defendant Bloomberg cannot sustain the instant action. Liability under § 1983

must be predicated on the defendant's direct or personal involvement in the alleged constitutional deprivation. Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994). A defendant can be personally involved in a § 1983 violation in four ways: "(1) by participating directly in the deprivation; (2) by failing to remedy the wrong after learning of the violation through a report or appeal; (3) by creating a policy or custom under which the unconstitutional practices occurred; or (4) in managing the subordinates who caused the deprivation in a grossly negligent way." Show v. Patterson, 955 F. Supp. 182, 188 (S.D.N.Y. 1997) (citing Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986)). Liability under § 1983 may not be based on *respondent superior* or vicarious liability theories. Monell v. Dep't of Social Servx., 436 U.S. 658, 691 (1978); Black v. Coughlin, 76 F.3d 72, 74 (2d Cir.1996). Here, plaintiff fails to offer any facts demonstrating that defendant Bloomberg had direct involvement with, knowledge of, or responsibility for the alleged deprivation of plaintiff's rights. Since the claim against defendant Bloomberg, as presently stated, can be supported only on the basis of *respondent superior* or vicarious liability doctrines, which are not applicable to § 1983 actions, the claims as to this defendant must be dismissed.

Plaintiff challenges the constitutionality of a New York City law, prohibiting "the right to drink an alcoholic beverage outside in Manhattan N.Y." Complaint at 1. Plaintiff alleges that he was ticketed and fined $15 for drinking an alcoholic beverage in a park. ID. At 2, Ex. C. The Administrative Code for the City of New York states: "No person shall drink or consume an alcoholic beverage, or possess, with intent to consume, an open container containing an alcoholic beverage in any public place except at a block party, feast or similar function for which a permit has been obtained." N.Y.C. Admin. Code § 10-125(b (2003). The code defines a "public place" as, *inter alia*, a "place of amusement, playground, *part* or beach." See N.Y.C. Admin. Code § 10-125(a)(2) (2003) (emphasis added).

With respect to public consumption and open container laws, courts have generally upheld the constitutionality of laws "which place[] some restriction upon an individual's freedom of action in the name of the police power [but] bear some reasonable relation to the public good." People v. Lee, 462 N.Y.S.2d 417, 419 (1983) (internal quotations & citations omitted). Although the state's highest court found that an open container law that lacked a specific intent to

consume alcohol was unconstitutional, id., the New York City law at issue, here, as well as other similarly worded statutes, have survived constitutional challenges, because they prohibit only the consumption of and the intent to consume alcohol. McDermott v. City of New York, No. 00 Civ. 8311 (LAK)(GWG), 2002 WL 265127, at *6 (S.D.N.Y. Feb. 25, 2002) (citations omitted). Report & Recommendation adopted, Order Slip. Op. (Mar. 26, 2002); see People v. Elhage, 537 N.Y.S.2d 375, 375-76 (App. Div. 1989) (upholding the constitutionality of a similarly-worded statute); cf. People v. Bothwell, 690 N.Y.S.2d 231, 234 (App. Div. 1999) (upholding enforcement of the New York City law). Thus, plaintiff's challenge to the open container law must fail.

To the extent that plaintiff seeks to assert a claim under § 1983 arising from violations of the Ninth Amendment, his complaint must be dismissed. "[Section] 1983 claims must be premised upon specific constitutional guarantees, of which the Ninth Amendment provides none." Doe v. Episcopal Social Servs., No. 94 Civ. 9171 (DAB), 1996 WL, 51191, at *1 (S.D.N.Y. Feb. 7, 1996) (internal citations omitted); see also Clynch v. Chapman, 285 F. Supp. 2d 213, 219 (D. Conn. 2003) (citing Froelich v. Wisconsin Dep't of Corr., 196 F.3d 800, 801 (7th Cir. 1999) ("The Ninth Amendment is a rule of interpretation rather than a source of rights. ...")); cf. People United for Children, Inc. v. City of New York, 108 F Supp. 2d 275, 300 n.19 (S.D.N.Y. 2000) ("[T]he Ninth Amendment does not confer substantive rights in addition to those conferred by other provisions of our governing law") (internal quotations and citations omitted). Therefore, to the extent plaintiff's claims rely on rights derived from the Ninth Amendment, the complaint must be dismissed.

CONCLUSION

Although this Court would generally permit amendment of a fee-paid complaint to cure any defects before dismissing the case *sua sponte*, Hughes v. Albany, 76 F.3d 53 (2d Cir.1996), there is no need to do so here as plaintiff presents to arguably meritorious issue. See Mallard v. United States Dist. Court, 490 U.S. 296, 307-08 (1989) ("Section 1915 ... authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provisionl."); Rolle v. Berkowitz, No. 03 Civ. 7120 (DAB) (RLE), 2004 WL 287678, at *1 (S.D.N.Y. Feb. 11, 2004) ("[C]ourts within the Second Circuit have

not hesitated to dismiss sua sponte claims brought by fee-paying pro se plaintiffs when it is clear such claims 'presen[t] no arguably meritorious issue for [the court's] consideration.'" (quoting Pillay v. Immigration & Naturalization Serv., 45 F.3d 14, 17 (2d Cir.1995) (per curiam) & other citations omitted); Fitzgerald v. First East Seventh St. Tenants Corp., No. 99 Civ. 6051 (JFK), 1999 WL 675996, at *1 (S.D.N.Y. Aug. 31, 1999) ("A district court in the Second Circuit may sua sponte dismiss a complaint even if the plaintiff has paid the filing fee") (citations omitted); Pourzandvakil v. Humphry, No. 94-CV-1594, 1995 WL 316935, at *8 (N.D.N.Y. May 23, 1995) ("The law in this circuit is that a district court may sua sponte dismiss a frivolous complaint even if the plaintiff has paid the filing fee." Id. (citing Tyler v. Carter, 151 F.R.D. 537, 540 (S.D.N.Y. 1993). Aff'd, 41 F.3d 1500 (2d Cir.1994))); Platsky v. Armand, No. CV-93-5154, 1994 WL 681415, at *7 (E.D.N.Y. Feb. 8, 1994) (although *pro se* litigants must be afforded special solicitude court, may dismiss "claims describing fantastic or delusional scenarios"); Parris v. Kelly, No. 93 Civ. 7391 (RWS), 1993 WL 497979 (S.D.N.Y. Nov. 30, 1993) (Fed. R. Civ. P. 12(b)(6) authorizes a district court to dismiss *sua sponte* a fee-paid complaint that is fantastic or delusional (citing Tyler, 151 F.R.D. at 540); c.f. Pillay v. Immigration & Naturalization Serv., 45 F.3d 14, 17 (2d Cir.1995) (per curiam) (discussing appellate court's inherent authority to dismiss meritless and/or frivolous fee-paid cases).

Accordingly, the complaint is dismissed. For purposes of taking an appeal, I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. See Coppedge v. United States, 269 U.S. 438, 444-45 (1962).

SO ORDERED

s/Michael B. Mukasey
MICHAEL B. MUKASEY
Chief Judge

Dated: October 15, 2004
New York, New York

APPENDIX D

JUDICIAL COUNCIL OF THE
SECOND CIRCUIT

[Filed August 18, 2005]

In re Docket No. 05-8502
CHARGE OF JUDICIAL MISCONDUCT

JOHN M. WALKER, JR., Chief Judge:

On January 10, 2005, the Complainant filed a complaint with the Clerk's Office for the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 351 (formerly § 372(c)) ("the Act") and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the "Local Rules"), charging a district court judge of this Circuit ("the Judge") with misconduct.

Background and Allegations:

The Complainant, the plaintiff in an action that proceeded before the Judge, alleges that although his complaint was received by the district court in February 2004, he was not notified of the docket number assigned to his case until October 2004; that he did not receive notice of the Judge's dismissal of his complaint with sufficient time to file a timely postjudgment motion; and that he was denied the opportunity to file pleadings and motions in his civil proceeding because he was notified of both the docket number assigned to his case and the Judge's order dismissing his case at the same time.

Disposition:

The complaint must be dismissed.

The Complainant has failed to identify any misconduct by the Judge covered by § 351. Although the Complainant complains of unreasonable delay, the Complainant's own submissions demonstrate that he received letters from the district court's *pro se* office advising him of the progression of his case. He received a letter in February 2004 advising him that his complaint had been received

and that he could contact the *pro se* office by telephone or letter if he had any questions. He received a second letter in June 2004 advising him that his case was undergoing judicial review and, again, that he could contact the *pro se* office by letter or telephone if he had any questions. The Complainant's action was then dismissed by the Judge in October 2004.

The Complainant's assertion that he did not receive notice of the Judge's dismissal of his complaint with sufficient time to file a timely postjudgment motion is likewise without merit. The district court's docket sheet indicates that the judgment dismissing the Complainant's action, filed on October 15, 2004, was not entered until October 25, 2004. Therefore, the complainant had until November 8, 2004 to file a timely postjudgment action. See Fed. R. Civ. P. 7(a); Fed. R. Civ. P. 59(b). The Complainant concedes that he received notice of the court's dismissal of his complaint on October 23, 2004, thereby allowing him to have timely filed such a motion. Finally, the Complainant has not demonstrated that he was denied the opportunity to file pleadings or motions in his civil proceeding. In any event, any matter that the Complainant wished to raise by filing a pleading or motion could have also been raised in a timely postjudgment motion. The Complainant has thus failed to show that the Judge engaged in any "conduct prejudicial to the effective and expeditious administration of the business of the courts." Local Rule 1(b).

The complaint is therefore dismissed. The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.

s/John M. Walker, Jr.
John M. Walker, Jr.
Chief Judge

Signed: New York, New York
August 18, 2005

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 1/27/05
Docket Number: 05-0298-cv
Short Title: Fedorov v. Bloomberg
DC Docket Number: 04-cv-8125
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Michael Mukasey

Dear Counsel:

Please be advised that the district court record on appeal in the above referenced case has been filed this date in the United States Court of Appeals for the Second Circuit.

For the Court,
Roseann B. MacKechnie, Clerk

s/Deborah A. Holmes
By: Deborah A. Holmes
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

[Filed October 19, 2005]

Date: 10/17/05
Docket Number: 05-0298-cv
Short Title: Fedorov v. Bloomberg
DC Docket Number: 04-cv-8125
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Michael Mukasey

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 19th day of Oct. two thousand five.

Present:

Hon. Thomas J. Meskill,

Hon. José A. Cabranes.

CIRCUIT JUDGES

Hon. Alan H. Nevas,

DISTRICT JUDGE

Fedorov v. Bloomberg, et al.

A petition for panel rehearing having been filed herein by Vic Fedorov

Upon consideration thereof, it is

Ordered that said petition be and hereby is **DENIED**.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/Tracy Young
Motion Staff Attorney

APPENDIX G

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

[Filed March 25, 2004]

THE PEOPLE OF THE STATE OF NEW YORK :
Respondent :
:
-- against - :
:
VICTOR FEDOROV :
Defendant – Appellant :

NOTICE OF APPEAL

Docket Number
2003SN106204

SIRS:

Please TAKE NOTICE that the defendant herein appeals to the Appellate Term of the Supreme Court of the State of New York, held in and for the First Judicial Dist., from the judgment convicting him/her on the 8 day of January 2004 of AC10-125(b) and sentencing him/her to fine $15.00 rendered in the Criminal Court of the City of New York, County of New York by the Hon.

on the 8 day of January 2004.

DATED: County of New York
the 25 day of March 2004

Yours,

Name Victor Fedorov

Address 68 Laurel Rd.
Princeton, NJ 08540

To: District Attorney
County of New York

APPENDIX H

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE
500 PEARL STREET, ROOM 230
NEW YORK, NEW YORK 10007

J. MICHAEL MCMAHON
CLERK OF COURT

Date: 2/18/04

Re: Fedorov, Vic v. The Honorable Mayor Bloomberg, et al.

Dear Litigant:

Please be advised that your papers were received by the *Pro Se* Office on February 9, 2004. If there are any problems with your papers, they may be returned to you.

If your papers are in order, they will be processed and assigned a docket number and a judge. Unless directed by the Court, please **DO NOT** submit any other papers until you have been assigned a docket number.

If you have any questions regarding these procedures, you may contact this Office by letter or by telephone during our normal business hours, 8:30 a.m. – 5:00 p.m., Monday – Friday (except federal holidays). Please note that we cannot accept collect calls.

Sincerely,

_____
Pro Se Clerk
(212) 805-0175

IMPORTANT NOTE:

YOU MUST IMMEDIATELY NOTIFY THE COURT OF ANY CHANGE OF YOUR ADDRESS BY SUBMITTING A LETTER TO THE *PRO SE* OFFICE OR YOU RISK DISMISSAL OF YOUR CASE.

rev. 7/03